

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD  
OF THE STATE OF DELAWARE**

**IN THE MATTER OF:  
MICHAEL KELLEHER,**

**Grievant,**

**v.**

**STATE OF DELAWARE DEPARTMENT  
OF HEALTH AND SOCIAL SERVICES,**

**Agency.**

**DOCKET NO. 01-06-242**

**DECISION AND ORDER**

**BEFORE** Brenda Phillips, Chairperson, Dallas Green, John F. Schmutz, John W. Pitts, and Paul R. Houck, Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* §5908(a).<sup>1</sup>

**APPEARANCES:**

**For the Grievant:**

Michael Kelleher, *pro se*

**For the Agency:**

Phoebe Young, Esquire  
Deputy Attorney General  
Carvel State Office Building  
820 N. French Street  
Wilmington, DE 19801

**PROCEDURAL HISTORY**

This is the second time the issue of the proper pay for Mr. Kelleher during and after his stint as Acting Deputy Director of the Division of Alcoholism, Drug Abuse and Mental Health ("DADAMH") has been before the Merit Employee Relations Board ("MERB" or "Board").

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<sup>1</sup> While present for much of the evidentiary presentation, Board member John W. Pitts had a prior medical appointment which precluded his participation in the deliberations or the decision of this matter.

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On December 16, 1998, Mr. Kelleher took a leave of absence from the Merit System in accordance with Merit Rule 6.0441, to become Acting Deputy Director of DADAMH. He served in that capacity until July 1, 1999 when he returned to the Merit System as DADAMH Chief of Administration. Upon Mr. Kelleher's return to the Merit System position he continued to be paid at the same pay grade he had been receiving while serving as Acting Deputy Director. On December 22, 1999, Mr. Kelleher was informed that he had been over paid during the period July 1, 1999 to December 22, 1999. On January 14, 2000, Mr. Kelleher received payroll documents indicating that his pay had been reduced by 9% from this pay during the period July - December of 1999.

Mr. Kelleher originally complained of violations of Merit Rule 6.0441 and Merit Rule No. 13.0320. The Agency moved to dismiss Mr. Kelleher's grievance appeal on January 3, 2001 on the grounds that it was not timely filed and that Mr. Kelleher has failed to state a claim upon which relief may be granted. The Board heard argument from the parties on the motion on February 1, 2001. On February 21, 2001, the Board issued its written decision which granted in part the motion and dismissed that grievance appeal with the understanding that should there be any attempt by the Agency to recoup the pay differential from Mr. Kelleher for the period July 1999 through December 1999 during which time Mr. Kelleher claims he was still performing the duties of Acting Deputy Director, he could grieve such action. Thereafter, the Agency notified Mr. Kelleher of its intent to recoup salary payments of 9% or \$2,511.02, reflecting the difference between the paygrade 22 applicable to the Acting Deputy Director position and the paygrade 21 applicable to the Chief of Administration position for the period during July-December 1999. Mr. Kelleher has grieved this proposed recoupment. His present grievance has moved through all of the steps of the grievance process. Mr. Kelleher appealed his Step 3 denial to the MERB on June 20, 2001 alleging violations

of Merit Rules 3.0100, 3.0410, 6.0441 and 13.0130. The evidentiary hearing before the Board was held on January 3, 2002. This is the Decision and Order of the Board based upon the evidence presented at that hearing.

### **RELEVANT MERIT RULES**

#### **MERIT RULE No. 3.0100**

The director as required by law shall establish and maintain a method of classifying all positions in the classified service. Positions substantially alike in duties and responsibilities, requiring essentially the same knowledge, skills and abilities, license or professional certification for satisfactory performance, and using the same minimum education and experience requirements, shall be grouped into the same class and the same rates of pay under similar working conditions shall be applicable thereto. A list of approved classifications will be maintained and kept current.

#### **MERIT RULE No. 3.0130**

A temporary promotion pursuant to Merit Rule 3.0410, may be granted by an appointing authority, for a period of time not to exceed six (6) months. When an assignment extends beyond 90 days, registers will be canvassed and selection will be made in accordance with the requirements of Merit Rule 13.0100.

#### **MERIT RULE No. 3.0410**

Any employee may be required by competent authority to perform any of the duties described in the class specification, any other duties which are of similar kind and difficulty, and any duties of lower classes in the same occupational series or in other series which have similar characteristics. Any employee may also be required to serve in a higher position in emergencies, or in relief of another employee. However, if such higher service continues beyond 30 calendar days, the rules concerning promotion or temporary promotions shall apply. (Chapter 13) Under exceptional circumstances, an appointing authority may submit for the Director's approval, written substitution for this paragraph.

#### **MERIT RULE No. 6.0441**

An appointing authority may request, and the Director may grant, an extended leave of absence to a classified employee to serve in any non-classified position described in 29 Del. C. §5903(4) (5) and (6). Upon the completion of that appointment, the Director shall place the employee in a classified position for which the employee meets the minimum qualifications. Upon re-entry into the Merit System, the employee's salary shall be set at a percentage of paygrade midpoint that the employee's salary represented at the time the employee took leave from the Merit System. Thereafter, the employee shall receive salary increases based upon the Budget Act and applicable Merit Rules.

#### **MERIT RULE No. 13.0130**

A temporary promotion pursuant to Merit Rule 3.0410, may be granted by an appointing authority,

for a period of time not to exceed six (6) months. When an assignment extends beyond 90 days, registers will be canvassed and selection will be made in accordance with the requirements of Merit Rule 13.0100.

### **SUMMARY OF THE EVIDENCE**

In sworn testimony Michael Kelleher explained to the Board that he was told in June of 1999 by the Department's Deputy Secretary that he would be returned to the Merit System after serving in the exempt position of Acting Deputy Director. At that time he asked the Department to make sure his salary would be correctly calculated as he was concerned about obtaining his annual increment at the start of the new fiscal year. From July 1999 through the end of December 1999 he continued to receive the same salary he had received as Acting Deputy Director.

According to Mr. Kelleher, during this period he continued to carry out the traditional Deputy Director duties which included preparing the weekly report to the Department Secretary; tending to constituent relations; managing the patient abuse and neglect investigation process; participating in the managed care meetings; commenting on legislation; and acting on behalf of the Director in her absence. He testified that the individual who was occupying the Deputy Director budget position was actually assigned to a different Division and was not performing the duties of the position through December of 1999. Mr. Kelleher asserts that the Department had a duty under the Merit Rules to either give him a temporary promotion to the Deputy Director position or to relieve him of the responsibilities of the position and should not be allowed to recoup the pay differential. Mr. Kelleher introduced into evidence copies of the job description for the Chief of Administration position (Appellant's Exhibit No. 1) and for the Deputy Director, Division of Aging (Appellant's Exhibit No. 2).

Judith Johnson, in sworn testimony, related that she worked for the Division from October 1980 through December 1999. She became Acting Deputy Director in June of 1993 and became Deputy Director in 1994. She also served as Acting Division Director from November 1998 until July of 1999 when she returned to the position of Deputy Director. Ms. Johnson testified that there are no specific duties for the Deputy Director, and no formal job description exists because the position is an exempt one which functioned to coordinate the activities of the Division under the guidance of the Director. She testified that while she was Deputy Director she prepared weekly reports and was the main point of contact for constituent relations. In that position she normally served as hearing officer for grievances and she had signature authority in the absence of the Division Director.

Ms. Johnson testified that she was the Acting Director before Renata Henry, the present Director, assumed the Director position. Ms. Johnson testified that she was returned to the Deputy Director position in July of 1999 but was on loan to another Division and therefore did not actually perform the duties of Deputy Director during the period from July 1999 to December 31, 1999.

Ms. Johnson also testified that she was the one who discovered the problems with the pay rates which Mr. Kelleher and others in the Division experienced. In December of 1999 she noted that her pay was incorrect and the investigation into the situation was begun. Ms. Johnson testified that she has repaid in one lump sum the overpayment which she received. She did not contest the overpayment which occurred when she continued to be paid at the rate for the Acting Director after she had left the position because she was not performing the duties. Ms. Johnson testified that she had requested that Mr. Kelleher be designated as Acting Deputy Director during the period when she was serving as Acting Director. She noted that they had not filled the Chief of Administration

position during the period when Mr. Kelleher was serving as acting Deputy Director.

Renata Henry, in sworn testimony, stated that she is presently the Director of the Division of Substance Abuse and Mental Health formerly known as the DADAHMA. She entered this position on July 1, 1999 and met with Michael Kelleher and other members of her senior staff during the first week or two. Mr. Kelleher was a supporter of the previous Director and asked what was going to be required of him. Ms. Henry testified that she discussed her vision for the Division and discussed her emphasis on fiscal matters. She specifically requested Mr. Kelleher to prepare the weekly report since she did not at that time have a Deputy Director. She stated that Mr. Kelleher never indicated to her that the preparation of such reports was beyond his job duties. Ms. Henry testified that she could have had any of her senior staff perform this duty and that it was not exclusively a Deputy Director responsibility. Ms. Henry testified that in her view, the job description for the Chief of Administration position which Mr. Kelleher occupied is very broad and comprehensive including among its duties the preparation of reports. Ms. Henry testified that it was clear to all that they did not have a Deputy Director on board at that time and that all of the senior management would need to accept extra responsibility until she could actually fill the Deputy Director position. She noted that as to constituent relations, that responsibility now rests with her Deputy Director but that Mr. Kelleher, in his capacity as Chief of Administration still deals with such matters as a part of his job description. Similarly, responsibility for PM 46 (patient abuse) investigations can be the responsibility of the Chief of Administration particularly when Harris Taylor, the individual who normally supervises such investigations, is on vacation. During the last half of 1999, Mr. Kelleher was involved with grievance matters but, Ms. Henry testified his involvement was in the nature of a witness because of his knowledge of the facts of a specific individual's grievances.

Concerning meetings which Mr. Kelleher asserts he attended during July - December 1999 as defacto Deputy Director, Ms. Henry testified that his attendance at such meetings was within his duties as Chief of Administration during that period when she was not able to have a functioning Deputy Director. Ms. Henry stated that during August of 1999, when she was away from the office she had asked Michael Kelleher to handle her administrative duties in her absence.

Yvonne Marshal, in sworn testimony explained that in her capacity as Personnel Administrator for the Division during 1999, she had investigated the payroll problems brought to her attention by Judith Johnson. Ms. Marshal testified that there was a problem at that time which was caused by having two separate systems in operation. The Division of Human Relations Department records were different than the State Payroll system in Mr. Kelleher's case because the state system was using his pay rate as the acting Deputy Director and had added to that rate the pay increase effective in July of 1999. Ms. Marshal identified State's Exhibit No. 1 as the calculation of the overpayment to Mr. Kelleher in the amount of \$2,511.06. Ms. Johnson stated that numerous checks were reviewed and there were 6 or 8 individuals who had been overpaid because of this problem. There were also several individuals who were under paid. All under payments have been corrected according to Ms. Marshal and in the 6 - 8 over payments there were two large ones, Ms. Johnson and Mr. Kelleher. At the present time only Mr. Kelleher has not returned the over payment.

#### **DISCUSSION, FINDINGS AND CONCLUSION**

Resolution of the present grievance appeal turns on whether Mr. Kelleher continued as the *de facto* Acting Deputy Director of DADAMAH until the end of December 1999 and whether he has established an entitlement to the higher pay grade associated with that position rather than the

paygrade 21 associated with his Merit System position as DADAHMA's Chief of Administration to which he formally returned in July of 1999. In order to prevail on his appeal Mr. Kelleher has the burden to establish, by a preponderance of the evidence, that he is entitled to the relief he seeks. This situation came about in large measure because the individual who was formally occupying the position of Deputy Director was on loan elsewhere. This created a situation where the new Director, Renata Henry, was unable to fill the Deputy Director position because it was already occupied. With no one actually available to perform as Deputy Director, Ms. Henry was required to look to her other senior staff members to assist her with the duties which she might have assigned to a Deputy had one been actually available.

The Board finds that the position of Deputy Director is not a Merit System position and does not have a specific job specification. The responsibilities of the position are largely defined by the DADAMHA Director. The position of Chief of Administration to which Mr. Kelleher returned is a Merit System position. The Agency claims that the work performed by Mr. Kelleher was consistent with the specifications of the Chief of Administration position and at no time after he returned to the Chief of Administration did he assert that he was improperly being asked to do the duties of the Deputy Director. Renata Henry, who became Director in July of 1999 testified convincingly that she did not appoint Mr. Kelleher as the Deputy Director or Acting Deputy Director, rather she divided the Deputy Director duties among her other staff members. Ms. Henry noted that at no time did Mr. Kelleher indicate to her that he was improperly performing the Deputy Director duties after his reinstatement as Chief of Administration. The position of Chief of Administration is a senior position with broad duties and responsibilities.

The Board finds that the duties performed by Mr. Kelleher after July 1999 were within the



proper responsibilities of the position of Chief of Administration and that although Mr. Kelleher may have had an increased work load, he was not required to function as the Acting Director after July of 1999.

Michael Kelleher, in his capacity as the Chief of Administration, was the Division's primary financial officer with responsibility to know that he was being paid at the pay rate for the Deputy Director position after he had been notified that he no longer occupied that position as Acting Deputy Director. The Agency argued that his assertion of a "*de facto*" status after July 1999 was an afterthought to avoid repayment. The Board concludes that Mr. Kelleher, under the Merit Rules, has no legitimate claim to the compensation associated with the position of Acting Deputy Director after his occupation of that position concluded in July of 1999. Mr. Kelleher's contention that he continued to perform the duties of the position is not supported by a preponderance of the evidence.

Under the circumstances, he has not met his burden of persuasion and has not established any violation of the Merit Rules which would serve to preclude the Division from attempting to recoup the wage overpayment.

### **ORDER**

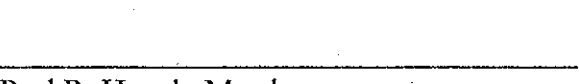
For the reasons stated above, the above captioned grievance of Michael Kelleher is denied.

BY ORDER OF THE BOARD this 17 day of January, 2002.

  
Brenda C. Phillips, Chairperson

  
John F. Schmutz, Member

  
Dallas Green, Member

  
Paul R. Houck, Member

## APPEAL RIGHTS

29 Del. C. § 10142 provides:

- (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
- (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
- (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
- (d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing Date:

Jan. 22, 2002

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Board counsel

Merit Employee Relations Board

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